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Contracts Formed under the Indian Self-Determination and Education Assistance Act Are as Binding as Any Other Government Agreements with a Contractor: *Cherokee Nation of Oklahoma v. Leavitt*

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Contracts Formed Under the Indian Self-Determination and Education Assistance Act are as Binding as Any Other Government Agreements with a Contractor: *Cherokee Nation of Oklahoma v. Leavitt*

GOVERNMENTS – NATIVE AMERICANS – INDIAN SELF-DETERMINATION AND EDUCATION ASSISTANCE ACT – The Supreme Court of the United States held that "self-determination" contracts between the Federal Government and Native American tribes are as binding on the Federal Government as any other contractor agreement.

Cherokee Nation of Oklahoma v. Leavitt, 543 U.S. 631 (2005).

In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act (hereinafter "ISDA") in order to strengthen collaborative relationships with Native American tribes.[1] The ISDA, as amended, allowed Native American tribes to contract with the federal government; under these contracts, the tribes themselves, rather than a federal agency, would provide health services to their members.[2] In return, the government agreed to reimburse the tribes for "administrative expenses" incurred in the provision of these services.[3] Under the ISDA, administrative expenses include "contract support costs," which are reasonable costs that a federal agency would not have incurred, but

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1. 25 U.S.C. § 450a(b) (2005). In passing the Act, Congress declared:
[Our] commitment to the maintenance of the Federal Government's unique and continuing relationship with, and responsibility to, individual Indian tribes and to the Indian people as a whole through the establishment of a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services. In accordance with this policy, the United States is committed to supporting and assisting Indian tribes in the development of strong and stable tribal governments, capable of administering quality programs and developing the economies of their respective communities.

Id.

2. Cherokee Nation v. Leavitt, 543 U.S. 631, 634 (2005). *See also* 25 U.S.C. § 450f(a).
3. *Cherokee Nation*, 543 U.S. at 634. *See also* 25 U.S.C. § 450f(a).

the tribes, as contractors, would incur in order to ensure compliance with the contract.[4]

Petitioners Cherokee Nation of Okalahoma and Shoshone-Pauite Tribes of the Duck Valley Reservation (collectively hereinafter "Tribes") entered into multiple contracts with the Federal Government (hereinafter "Government"), under the ISDA, to provide services previously supplied by the U.S. Indian Health Service.[5] In each agreement, the Government promised to pay contract support costs, but later refused to pay the full amount on the grounds it had not received sufficient funds from Congress.[6] The Tribes pursued their claims through two separate cases, which were subsequently consolidated by the United States Supreme Court.[7]

In the first case, Cherokee Nation submitted contract claims for fiscal year 1997, and the Shoshone-Pauites, for fiscal years 1996 and 1997.[8] They submitted these claims to the Department of the Interior (hereinafter "Department"), which was responsible for the relevant appropriations.[9] When the Department refused to pay, the Tribes brought an action for breach of contract in the Federal District Court for the Eastern District of Oklahoma, seeking a total of $6.9 million in damages.[10] The district court found for the Government, and the Court of Appeals for the Tenth Circuit affirmed.[11]

In the second case, Cherokee Nation submitted claims for fiscal years 1994, 1995, and 1996.[12] The denial of these claims by the Department was reversed by the Board of Contract Appeals, which ordered the Government to pay $8.5 million in damages.[13] The Government appealed to the Court of Appeals for the Federal Circuit, which affirmed the Board's decision in favor of the Tribe.[14]

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4. *Cherokee Nation*, 543 U.S. at 635. *See also* 25 U.S.C. § 450j.
5. *Cherokee Nation*, 543 U.S. at 635.
6. *Id.*
7. *Id.* at 635-36.
8. *Id.* at 635. The contracts were for tribal administration of community health programs, including the 15 bed Owyhee Community Health Facility. Cherokee Nation of Oklahoma v. United States, 190 F. Supp. 2d 1248, 1252 (D. Okla. 2001).
9. *Cherokee Nation*, 543 U.S. at 635.
10. *Id.* at 636.
11. *Id.*
12. *Id.* The contracts were for the tribal administration of "hospitals, health clinics, dental services, mental health programs, and alcohol and substance abuse programs, all of which were formerly operated by [the Federal Government]." Thompson v. Cherokee Nation, 334 F.3d 1075, 1081 (Fed. Cir. 2003).
13. *Cherokee Nation*, 543 U.S. at 636.
14. *Id.*

The Supreme Court of the United States granted certiorari and consolidated the cases in order to settle the difference between the circuits.[15]

Justice Breyer wrote the majority opinion.[16] He began by presenting a series of facts asserted by the Tribes and not denied by the Government:[17] The Government did promise to pay, then failed to pay, the costs at issue.[18] If the contracts at issue had been standard procurement contracts,[19] they would have been legally binding.[20] Congress annually appropriated between $1.277 billion and $1.419 billion to the Indian Health Service to execute the Indian Self-Determination Act.[21] These amounts far exceeded the amounts at issue in these cases.[22] The congressional appropriations were in lump-sum amounts, without any statutory restrictions applicable to these claims (no "spending cap").[23] In the case of normal procurement contracts, when Congress appropriates sufficient funds to pay contracts at issue as part of a lump-sum appropriation, the Government is legally bound to pay those claims.[24] The Government may not invalidate such contracts merely by contracting for a total amount greater than the appropriation, even if the contracts at issue contain a "subject to the availability of appropriations" clause.[25]

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15. *Id.*

16. *Id.* Justice Breyer was joined by Justices Stevens, O'Connor, Kennedy, Souter, Thomas, and Ginsburg. *Id.* at 633. Justice Scalia wrote a concurring opinion. *Id.* Chief Justice Rehnquist took no part in the decisions. *Id.*

17. *Cherokee Nation*, 543 U.S. at 636-37.

18. *Id.* at 636.

19. Procurement contracts are:

> the legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient [to be used] when (1) the principal purpose of the instrument is to acquire (by purchase, lease, or barter) property or services for the direct benefit or use of the United States Government; or (2) the agency decides in a specific instance that the use of a procurement contract is appropriate.

31 U.S.C. § 6303 (2002).

20. *Cherokee Nation*, 543 U.S. at 636.

21. *Id.* at 637. *See also* 107 Stat. 1408 (1993); 108 Stat. 2527-2528 (1994); 110 Stat. 1321 (1996).

22. *Cherokee Nation*, 543 U.S. at 637.

23. *Id.*

24. *Id.*

25. *Id.* See, for example, the case of *Lincoln v. Vigil*, 508 U.S. 182 (1993), where the U.S. Supreme Court defined a fundamental principle of appropriations law: Where "Congress merely appropriates lump-sum amounts without [statutory restrictions], a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish [additional] legal requirements." *Lincoln*, 508 U.S. at 192 (quoting In re LTV Aerospace Corp., 55 Comp.Gen. 307, 319 (1975)).

The Court then reasoned that if the Government denied none of these facts, it must demonstrate that the contracts at issue were somehow different from standard procurement contracts in order to prevail.[26] The majority examined and rejected the Government's argument that contracts created under the ISDA are a "unique, government-to-government" type of "self-determination contract" differing from "standard government procurement contracts."[27] The Government argued that because the Tribes take the place of Government agencies in providing services under the ISDA, and because the Tribes have mutual self-awareness of the various contracts, they should be treated under the law as another government agency rather than as a contractor.[28] The Government further argued that this quasi-agency status would require the tribes to bear the risk of not being paid if the congressional appropriation is insufficient to cover all of the Government's contracts pursuant to execution of the ISDA.[29] The Government attempted to support its argument with two quotes from the ISDA: "no [self-determination] contract . . . shall be construed to be a procurement contract" and "[a tribe need not deliver services] in excess of the amount of funds awarded."[30]

The Court rejected this argument because, as Justice Breyer explained, the language of the ISDA read as a whole strongly suggested that Congress intended contracts made under the ISDA to be as binding as any other Government contractual promise.[31] Justice Breyer then pointed out that the ISDA uses the word "contract" 426 times to describe the nature of the agreement between the Government and the Tribes, with no language to indicate that the word "contract" as used in the ISDA means anything other than its normal legal definition.[32] The majority also noted a specific clause in the ISDA entitling contractors to "money damages"

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26. *Cherokee Nation*, 543 U.S. at 638.

27. *Id.* (quoting from Brief for Federal Parties at 4, Cherokee Nation v. Leavitt, 543 U.S. 631 (2005) (Nos. 02-1472, 03-853)).

28. *Cherokee Nation*, 543 U.S. at 638.

29. *Id.*

30. *Id.* at 638-39 (citing Brief for Federal Parties, *supra* note 27, at 24 (quoting 25 U.S.C. § 450b(j) and 25 U.S.C. § 450l(c) (2005))).

31. *Cherokee Nation*, 543 U.S. at 639.

32. *Id.* "[T]he word 'contract' normally refers to 'a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes a duty.'" *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981)).

under the Contracts Dispute Act if the Government refuses to pay.[33]

In response to the selected ISDA excerpts cited by the Government in support of its position, the Court recognized that the overall purpose of the ISDA was to promote greater self-reliance among Native American tribes, in part by remedying past Governmental failures to reimburse the Tribes for legitimate administrative costs.[34] Justice Breyer further explained that the Government's specific quotes did not actually support its argument because the language indicating that the tribes need not deliver services "in excess of the amount of funds awarded" is a clause often used in standard government procurement contracts.[35] Furthermore, the majority held that the ISDA's provision that self-determination contracts are not to be construed as procurement contracts merely means that self-determination contracts are not subject to some technical reporting requirements of standard procurement contracts; it does not mean that self-determination contracts are less legally binding.[36] Finally, the Court stated it found no evidence that Congress supported the Government's argument that the Tribes, rather than the Government, should bear the risk if Congress should approve a lump-sum insufficient to pay all the Government's contracts.[37]

Having determined that the contracts at issue were no different from normal government procurement contracts, the majority then applied this designation as it addressed the Government's

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33. *Cherokee Nation*, 543 U.S. at 639. The Contract Disputes Act ("CDA") includes a set of "comprehensive procedures [which] govern the resolution of contract disputes that arise between the government and contractors. The CDA was intended primarily to create opportunities for informal dispute resolution at the contracting officer level and to provide contractors with clear notice as to the government's position regarding contract claims." 64 AM. JUR. 2D *Public Works and Contracts* § 206 (2005).

34. *Cherokee Nation*, 543 U.S. at 639. (citing 25 U.S.C. § 450a(b) and 25 U.S.C. § 450j-1). 25 U.S.C. §450j-1(d)(2) states: "Nothing in this subsection shall be construed to authorize the Secretary to fund less than the full amount of need for indirect costs associated with a self-determination contract."

35. *Cherokee Nation*, 543 U.S. at 639-40 (citing W. KEYES, GOVERNMENT CONTRACTS UNDER THE FEDERAL ACQUISITION REGULATION § 32.38, p. 724 (3d ed. 2003)).

36. *Cherokee Nation*, 543 U.S. at 640.

37. *Id.* The government had argued that, just as a federal agency has no legal right to receive the amount promised by Congress, neither should the Tribes since, by providing services in place of a Federal agency, they had elected to "ste[p] into the shoes of a federal agency." *Id.* at 638 (quoting from Brief for Federal Parties at 25, Cherokee Nation v. Leavitt, 543 U.S. 631 (2005)). *See also* Ferris v. United States, 27 Ct. Cl. 542, 546 (1892) ("A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its diversion, whether legal or illegal, to other objects.").

remaining arguments.[38] The Court began by considering and rejecting the Government's dual arguments that its promises were statutorily nonbinding under two provisions in the ISDA, the "Appropriations Clause" and the "Reduction Clause."[39]

First, Justice Breyer noted that the congressional appropriations under the ISDA for the relevant years did contain sufficient unrestricted funds to pay the claims at issue.[40] The Government's argument that those unrestricted funds were used to pay other expenses[41] incurred by the Government was dismissed as irrelevant by the majority.[42] Justice Breyer pointed out that even a critical alternative need for the funds is insufficient to release the Government from binding contractual promises, absent some special statutory provision.[43] The Court then reasoned that if the Government intentionally breaches a contract[44] in order to accomplish some more important objective, the injured contractor is then free to pursue appropriate legal remedies.[45]

Second, the Court rejected the Government's attempt to bolster its position with a proviso in the ISDA that stated the Government's provision of funds is "subject to the availability of appropriations."[46] Justice Breyer explained that this type of language is common in Government contracts and normally means that those contracts, if negotiated in advance of the fiscal year, are not binding until Congress actually appropriates the funds, which it did in each of the years relevant to this case.[47] Emphasizing the impor-

38. *Cherokee Nation*, 543 U.S. at 640-44.

39. *Id.* at 640-41. "The amount of funds required by subsection (a)-- (1) shall not be reduced to make funding available for contract monitoring or administration by the Secretary; [and] (2) shall not be reduced by the Secretary in subsequent years . . . ." 25 U.S.C. § 450j-1(b).

40. *Cherokee Nation*, 543 U.S. at 641.

41. At least some of the funds were used for the running of the Indian Health Service's central Washington office. *Id.* at 641-42.

42. *Id.* at 642.

43. *Id.* The Court also found irrelevant the Government's citation of statutory language forbidding the Government to contract for certain types of services because the provision cited had nothing to do with the source of funds for legitimately contracted activities, which was the issue in this case. *Id.*

44. *Id.* The Court expressed its belief that the Government should attempt to avoid breaching contracts by "refraining from making less essential contractual commitments; or by asking Congress in advance to protect funds needed for the more essential purposes with statutory earmarks; or by seeking additional funding from Congress. . . ." *Id.*

45. *Cherokee Nation*, 543 U.S. at 642.

46. *Id.* (quoting 25 U.S.C. § 450j-1(b)(2005)).

47. *Cherokee Nation*, 543 U.S. at 643.

tance of providing a consistent interpretation[48] of similar provisions in comparable federal statutes, the Court found that the Government failed to meet its burden of showing why this proviso should be given any other interpretation than the standard one applied by the majority.[49]

Finally, the Court examined and rejected the Government's third argument, that its position was supported by a later-enacted statute, § 314 of the 1999 Appropriations Act.[50] The majority opined that this statutory language is open to two interpretations.[51] First, the language cited could be read as retroactively barring all payment of claims arising out of contracts for the years 1994-1997.[52] The Court rejected this interpretation because it would undo binding governmental contractual promises, possibly in violation of the Constitution.[53] Alternatively, the provision could be read as prohibiting the payment of those claims only by unspent funds appropriated in prior years.[54] The Court chose this interpretation as best reflecting Congress' intent, especially in light of contemporaneous actions by the Executive Branch.[55] The Court flatly rejected a third interpretation, urged by the Government, that the statute should be read as clarifying earlier ambiguous appropriations language that was wrongly read as unrestricted, because the Court did not find the earlier statute to be ambiguous; rather, the Court found the statute clearly provided unrestricted lump-sum appropriations.[56]

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48. *Id.* at 644. The majority expressed a concern that inconsistent interpretation would "undermine contractors' confidence that they will be paid, and in turn increase the cost to the Government of purchasing goods and services." *Id.*

49. *Id.* Justice Breyer specifically noted that the legislative history cited by the Government established only that the Executive Branch *wanted* discretionary authority to allocate lump-sum appropriations insufficient to cover all its contracts, not that Congress every *granted* such authority. *Id.*

50. *Id.* at 645-46. The provision at issue read, "Notwithstanding any other provision of law . . . [the] amounts appropriated to or earmarked in committee reports for the . . . Indian Health Service . . . [for] payments to tribes . . . for contract support costs . . . are the total amounts available for fiscal years 1994 through 1998 for such purposes." Appropriations Act of 1998, Pub. L. No. 105-277, §314, 112 Stat. 2681 (1998).

51. *Cherokee Nation*, 543 U.S. at 645.

52. *Id.*

53. *Id.* at 646.

54. *Id.*

55. *Id.* at 645-46. The majority referred to (1) a ruling by the Interior Department's Board of Contract Appeals in In re Alamo Navajo School Board and Miccosukee Corp., 98-2 B.C.A. P29, 831 (Dep't of Interior Dec. 4, 1997) that the Government was legally bound by contracts similar to those in this case and (2) an Indian Health Service draft document suggesting the possibility of using surplus funds from 1994-1997 to pay contract support costs. *Id.*

56. *Cherokee Nation*, 543 U.S. at 646-47.

Having determined that the contracts at issue, formed under the ISDA between the Tribes and the Government, were as binding as standard government procurement contracts, the Court affirmed the Federal Circuit's judgment in favor of the Cherokee Nation, reversed the Tenth Circuit's judgment in favor of the Government, and remanded both cases for further proceedings consistent with this opinion.[57]

In his brief concurring opinion, Justice Scalia stated that he agreed with the entire majority opinion except for its reliance on a senate committee report as a tool for statutory interpretation.[58] Justice Scalia asserted that a congressional committee report, which was written by staff members and may never have been read by more than a few congressmen, cannot be said to express the intent of the United States Congress.[59]

The most basic principle of contract law is that promises ought to be kept.[60] A contract is a promise to do something in the future, a promise made binding by the power of the law.[61] When one party breaches a contract, whether by non-performance or repudiation, the nonbreaching party may claim damages.[62]

In the 1892 case of *Ferris v. United States*,[63] the United States Court of Claims held that nonpayment of a contract by the Federal Government is such a breach of contract, for which the court may order the payment of damages as a remedy to the nonbreaching party.[64] The United States Army hired Ferris to dredge a channel of the Delaware River, delayed his work by several months, and then ordered him to stop before the project was complete.[65] The Army refused to pay Ferris the full amount of the contract on the

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57. *Id.* at 636.

58. *Id.* at 647 (Scalia, J., concurring in part). The majority cited S. Rep. No. 100-274, at 7 (1987) (explaining the decision not to submit tribal contracts to procurement rules in order to reduce "excessive paperwork and unduly burdensome reporting requirements."). *Id.* at 640 (majority opinion).

59. *Id.* at 647 (Scalia, J., concurring in part).

60. JOHN E. MURRAY, JR., MURRAY ON CONTRACTS § 1 (2001) (quoting S. PUFENDORF, DE JURE NATURAE ET GENTIUM, Bk. III, ch. IV, § 2: *"pacta sunt servanda"*) ("It is, therefore, a most sacred precept of natural law, and one that governs the grace, manner and reasonableness of all human life, that every man keep his given word, that is, carry out his promises and agreements.") In the same section, Pufendorf quoted ARISTOTLE, RHETORIC, Bk. I, ch. XV(22): "If contracts are invalidated, the intercourse of men is abolished." MURRAY, *supra*, at § 1.

61. MURRAY, *supra* note 60, at § 2.

62. RESTATEMENT (SECOND) OF CONTRACTS § 236 (1981).

63. 27 Ct. Cl. 542 (1892).

64. *Ferris*, 27 Ct. Cl. 542.

65. *Id.*

grounds that the appropriation which covered the project had been exhausted.[66] The court, however, held that exhaustion of an appropriation did not relieve the government of its contractual obligation to Ferris.[67]

However, the United States Supreme Court subsequently held that the government's contractual obligation is limited by the amount of the appropriation in *Sutton v. United States*.[68] As in *Ferris*, a dredging company, represented by Sutton, was hired for a federal dredging project.[69] The government supervisor overseeing the project allotted some of the appropriation to the contractors and some to his own office expenses.[70] When the government supervisor erred and ordered more dredging than the appropriation would cover, the government refused to pay the dredging company.[71] The *Sutton* Court held that no agent of the government has the authority, express or implied, to contract for goods or services in excess of the amount of the appropriation.[72] The Court also decided that individuals contracting with the government are held to have notice of the total amount that has been appropriated.[73] Nevertheless, those contractors are entitled to payment to the full extent of the available appropriation, including any amount the government has reserved for its own use.[74]

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66. *Id.*

67. *Id.* at 546 (citing Dougherty's Case, 18 Ct. Cl. 496 (1883)). The court in *Dougherty* stated:

> A contractor who is one of several persons to be paid out of an appropriation is not chargeable with knowledge of its administration, nor can his legal rights be affected or impaired by its maladministration or by its diversion, whether legal or illegal, to other objects. An appropriation *per se* merely imposes limitations upon the Government's own agents; it is a definite amount of money entrusted to them for distribution; but its insufficiency does not pay the Government's debts, nor cancel its obligations, nor defeat the rights of other parties.

Id.

68. Sutton v. United States, 256 U.S. 575 (1921).

69. *Sutton*, 256 U.S. at 577. Sutton was a bankruptcy trustee for Hillsboro Dredging Company. *Id.* at 578.

70. *Id.* at 581. The amount appropriated was $23,000. *Id.* The Government originally paid the contractor only $21,267 and reserved the remaining $1,733 for office expenses. *Id.*

71. *Id.* 581. The contractor claimed an additional $4594. *Id.* at 578

72. *Id.* at 579.

73. *Id.*

74. *Sutton*, 256 U.S. at 581. The *Sutton* Court held

> if, through mistake of the Government's representatives more work is done, and work is continued for a longer period than was contracted for or authorized, . . . the contractor should not be made to suffer by the depletion of the appropriation. The fund otherwise available for work actually performed should be applied to that purpose.

Id.

The United States Court of Claims distinguished *New York Airways v. United States*[75] from *Sutton* by emphasizing the limiting language of both the *Sutton* contract and the statute under which the dredging funds were appropriated.[76] In contrast, the *New York Airways* contracts with the Civil Aeronautics Board were created under a statute that expressly required the carriers to transport the United States mail whenever requested by the Postmaster General and promised compensation in return.[77] The Court held that where the contractual obligation is part of the statutory language, contracts made under that statute create an obligation in the federal government which is not relieved merely by Congress' failure to appropriate sufficient funds, unless Congress also clearly modifies or repeals the statute as well.[78]

The rights of individual contractors vis-à-vis the federal government were strengthened further in *Blackhawk Heating & Plumbing Co. v. United States*.[79] In 1967, the Veteran's Administration signed a fixed-price contract with Blackhawk and its partner company for the construction of a hospital.[80] After the hospital was completed, the government and Blackhawk renegotiated the final settlement price of ten million dollars in an agreement that contained a contingency clause.[81] The government told Blackhawk that funds for this final payment would be shifted from other Veteran's Administration projects, through a "reprogramming" of funds, which meant Blackhawk would have to wait

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75. 369 F.2d 743 (Ct. Cl. 1966).

76. *New York Airways*, 369 F.2d 748. The court held that:

> Where, however, a construction contract expressly provided that the quantities of work ordered shall be kept "within the limits of available funds," and a statute prohibited obligating the Government to pay a larger sum than covered by a specific appropriation, extra work ordered and performed in excess of the appropriation was held not to create an obligation against the Government enforceable in the courts.

Id. at 749.

77. *Id.* at 745 & n.1 (citing the Federal Aviation Act of 1958 § 401(l), 49 U.S.C. § 1371 (1958): "Whenever so authorized by its certificate, any air carrier shall provide necessary and adequate facilities and service for the transportation of mail, and shall transport mail whenever required by the Postmaster General. Such air carrier shall be entitled to receive reasonable compensation therefore as hereinafter provided.").

78. *New York Airways*, 369 F.2d at 748 (citing United States v. Vulte, 233 U.S. 509 (1914)). "It has long been established that mere failure of Congress to appropriate funds, without further words modifying or repealing, expressly or by clear implication, the substantive law, does not in and of itself defeat a Government obligation created by statute." *New York Airways*, 369 F.2d at 748.

79. 622 F.2d 539 (Ct. Cl. 1980).

80. *Blackhawk*, 622 F.2d at 541.

81. *Id.* at 541-42.

until the completion of the reprogramming for the funds to be available.[82] After the settlement agreement was signed, the senate subcommittee overseeing the Veteran's Administration issued a report suggesting that the Administration's settlement authority should be limited to six million dollars.[83] The Veteran's Administration limited its payment to Blackhawk to six million dollars, but Blackhawk eventually sued and received an additional two million.[84]

In explaining its decision in *Blackhawk*, the United States Court of Claims noted that mere congressional disapproval, as expressed in a committee report, is not an affirmative congressional action.[85] The court then held that the Veterans Administration's need to reprogram funding streams did not entitle it to invoke the contingency clause so long as funds were available from the overall appropriation.[86] The right to payment vested in the contractor when sufficient appropriated funds were available at the time the payment was due, a right that could not be divested by subsequent legislative action.[87]

One issue raised in *Blackhawk*, the issue of federal agency discretion in the face of congressional disapproval, appeared again in *Lincoln v. Vigil*,[88] which was argued before the United States Supreme Court in 1993.[89] When the Federal Indian Health Service discontinued a program serving handicapped Southwest Indian children in favor of a national program, members of the Southwest tribes sought an injunction to preserve their program.[90] The Supreme Court reasoned that the Service's decision was not subject to judicial review based on the principle that allocation of lump sum appropriations is legally committed to the discretion of the agency.[91] The majority held this to be true even if the legislative

82. *Id.* at 542. The specific language in the contract read: "The Government's obligation hereunder is contingent upon the availability of appropriated funds from which payment in full can be made." *Id.* The Government negotiator repeatedly told the contractor that the funds were available. *Id.* at 542-43.

83. *Id.* at 544-45.

84. *Id.* at 546. The court held that the government's failure to pay final two million dollar payment was not actionable because Congress prohibited that payment by affirmative action before the final payment was due. *Id.* at 553.

85. *Blackhawk*, 622 F.2d at 552.

86. *Id.*

87. *Id.* at 553.

88. 508 U.S. 182 (1993).

89. *Lincoln*, 508 U.S. at 184.

90. *Id.* at 189.

91. *Id.* at 184.

history of the appropriations statute, but not the statute itself, contained language indicating how Congress expected the funds to be spent.[92]

A second issue from *Blackhawk*, whether the government may retroactively repudiate its obligation, reappeared in 1996 in *United States v. Winstar Corporation*.[93] *Winstar* involved three financial institutions (hereafter "thrifts") that brought suit against the Federal Home Loan Bank Board (hereafter "Board") for breach of contract and constitutional claims based on the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (hereafter "FIRREA").[94] Prior to FIRREA, the thrifts had signed contracts with the Board, agreeing to take on "supervisory" roles with failing financial institutions.[95] In return, the Board promised the thrifts they would be allowed to count good will and capital credits as part of their required capital reserves.[96] After this accounting practice was disallowed by the passage of FIRREA, the thrifts were negatively impacted by their failure to maintain their required capital.[97] Subsequently, the thrifts brought suit against the government for breach of contract.[98]

The United States Supreme Court read the contracts as an agreement by the government to assume the risk of insuring the thrifts against losses arising from future changes in the regulations, the exact situation created by FIRREA.[99] Under this reading, the majority held, the contracts at issue did not restrict Congress's future regulatory authority but the contracts did assign to the government the risk of any resulting harm sustained by the thrifts as a result of Congress' actions.[100] The Court refused to construe the FIRREA statute as abrogating the government's con-

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92. *Id.* at 191. The majority stated:

> [A] fundamental principle of appropriations law that where "Congress merely appropriates lump-sum amounts without statutorily restricting what can be done with those funds, a clear inference arises that it does not intend to impose legally binding restrictions, and indicia in committee reports and other legislative history as to how the funds should or are expected to be spent do not establish any legal requirements on" the agency.

Id. at 192.

93. 518 U.S. 839 (1996).

94. *Winstar*, 518 U.S. at 843.

95. *Id.* at 847-48.

96. *Id.* at 848-49.

97. *Id.* at 857-58. Thrifts which could not maintain the required capital were subject to seizure by thrift regulators. *Id.*

98. *Id.* at 839.

99. *Winstar*, 518 U.S. at 843.

100. *Id.* at 871.

tractual obligations to the thrifts.[101] Furthermore, the Court pointed out that the government's attempt to shift the unexpected costs to its contractual partners was actually against the government's own long-term interest because it would undermine the government's credibility with future contractors, ultimately resulting in increased costs to the government.[102]

The United States Supreme Court later applied the *Winstar* doctrine in interpreting the Indian Self-Determination and Education Assistance Act, which formed the statutory backdrop for *Cherokee Nation v. Leavitt*.[103] ISDA outlines circumstances under which the tribes may choose to contract with the federal government.[104] Passed in 1975, ISDA was designed to encourage tribes to achieve greater self-determination in the areas of education and health services.[105] Tribes could elect to contract with the federal government to provide their own services in exchange for payments from either the Department of Health, Education and Welfare or the Department of the Interior.[106]

Unfortunately for the tribes, the United States Claims Court held, in *Busby v. United States*,[107] that contracts formed under the ISDA were not subject to the provisions of the Contract Disputes Act, thus denying the tribes access to a federal contract dispute resolution process available to other government contractors.[108] In *Busby*, the Northern Cheyenne Indian Tribe brought suit against the federal government for the government's failure to repair a tribal school.[109] The tribe had an ISDA self-determination contract

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101. *Id.* at 875.

102. *Id.* at 883-84.

103. *Cherokee Nation*, 543 U.S. at 644.

104. 25 U.S.C. §§ 450-450m-1 (2005).

105. Indian Self-Determination and Education Assistance Act, Pub. L. No. 93-638, 88 Stat. 2203 (1975). The stated purposes of the Act were:

> to provide maximum Indian participation in the Government and education of the Indian people; to provide for the full participation of Indian tribes in programs and services conducted by the Federal Government for Indians and to encourage the development of human resources of the Indian people; to establish a program of assistance to upgrade Indian education; to support the right of Indian citizens to control their own educational activities; and for other purposes.

Id.

106. *Id.*

107. 8 Cl. Ct. 596 (1985).

108. *Busby*, 8 Cl. Ct. at 598. "Where a federal contract contains a disputes clause that is not governed by the CDA, and also provides a specific administrative remedy for a particular dispute, the contractor must exhaust its administrative contractual remedies prior to seeking judicial relief." 64 AM. JUR. 2D *Public Works and Contracts* § 206 (2005).

109. *Busby*, 8 Cl. Ct. at 596.

to administer the school, but the government retained the responsibility for maintaining and repairing the school building.[110] The government neglected to perform necessary repairs for over a decade, until the building became uninhabitable and the State of Montana put the school's accreditation on probation.[111]

However, when the tribe brought suit, the Claims Court rendered summary judgment for the government.[112] First, the court noted that not all contracts fall within the Contracts Dispute Act.[113] The majority then reasoned that, because the tribal self-determination contracts were not "procurement" contracts, they fell outside the regulations generally governing contracts between the government and private contractors.[114]

Busby remained law for three years, until it was overturned by congressional statute in the 1988 Amendment to the ISDA.[115] Congress added a section on contract appeals, specifying that the Tribes *could* bring suit against the government for breach of contracts created under the ISDA.[116] At the same time, Congress af-

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110. *Id.* at 600. The contract actually prohibited the tribe from using contractual funds to repair the school themselves without the Government's express approval. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* at 599. In support of this position, the Court cited *Coastal Corp. v. United States*, 713 F.2d 728, 730 (Fed. Cir. 1983) (an "implied contract, which defines the way the government must deal with bids in the process of selecting a contractor, is not a contract [subject to the Contracts Dispute Act]") and *Newport News Shipbuilding & Dry Dock Co. v. United States*, 7 Cl. Ct. 549, 552-54 (1985) (which held that a "subsidy contract" between the U.S. Merchant Marine and a shipbuilder was not subject to the Contract Dispute Act).

114. *Busby*, 8 Cl. Ct. at 600. The Court defined the tribal contracts as being "basically grant or sociological type contracts designed to accomplish government social policy goals." *Id.*

115. Pub. L. No. 100-472, 102 Stat. 2285 (1988).

116. 25 U.S.C. § 450m-1(a) (2005). The statute reads:

> The United States district courts shall have original jurisdiction over any civil action or claim against the appropriate Secretary arising under this Act and, subject to the provisions of subsection (d) of this section and concurrent with the United States Court of Claims, over any civil action or claim against the Secretary for money damages arising under contracts authorized by this Act. In an action brought under this paragraph, the district courts may order appropriate relief including money damages, injunctive relief against any action by an officer of the United States or any agency thereof contrary to this Act or regulations promulgated thereunder, or mandamus to compel an officer or employee of the United States, or any agency thereof, to perform a duty provided under this Act or regulations promulgated hereunder (including immediate injunctive relief to reverse a declination finding under section 102(a)(2) [25 USCS § 450f(a)(2)] or to compel the Secretary to award and fund an approved self-determination contract).

Id.

firmed that these contracts were not subject to the same requirements as procurement contracts.[117]

In another section of the 1988 amendment, Congress specified that the amount of funds paid under a self-determination contract must not be less than the government would have spent administering the same health services program, plus the amount of contract support costs.[118] The statute went on to define contract support costs as reasonable costs for activities undertaken by the Tribes in order to comply with the contract, even if the Tribes had to engage in activities beyond those that would be needed by the government in providing the same services.[119]

In 1997, the United States Court of Appeals for the Tenth Circuit found that the government had violated the support costs provision of the ISDA in *Ramah Navajo Chapter v. Lujan*.[120] Ramah Navajo Chapter, a Navajo Nation organization, had five self-determination contracts with the United States Department of the Interior and two contracts with the State of New Mexico, funded by the United States Department of Justice.[121] Ramah and the government disagreed over the correct formula for determining the Chapter's contract support costs.[122] The Tenth Circuit held that the Department of Justice funds could not be included in the direct cost base because doing so would deprive the tribe of full indirect cost reimbursement.[123] In interpreting the 1988 Amendment to the ISDA, the Court noted that any ambiguity in federal

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117. 25 U.S.C. § 450e-1 (2005).

118. *Id.* § 450j-1(a)(1). *See also* S. REP. NO. 100-274, at 8-13 (1987), which notes "the single most serious problem with the implementation of the Indian self-determination policy has been the failure . . . to provide funding for the indirect costs associated with self-determination contracts."

119. 25 U.S.C. § 450j-1(a)(2) (2005). Specifically, the statute says:

> There shall be added [to the amount paid for services equaling what the Government would have spent] contract support costs which shall consist of an amount for the reasonable costs for activities which must be carried on by a tribal organization as a contractor to ensure compliance with the terms of the contract and prudent management, but which (A) normally are not carried on by the respective Secretary in his direct operation of the program; or (B) are provided by the Secretary in support of the contracted program from resources other than those under contract.

Id.

120. 112 F.3d 1455 (10th Cir. 1997).

121. *Ramah*, 112 F.3d at 1458-59.

122. *Id.* at 1460.

123. *Id.* at 1463. "By Including the Department of Justice funds in the direct costs base, defendants effectively and knowingly reduced the amount of funding they would provide to [the Tribe] to cover the indirect costs pool and thereby deprived [the Tribe] of full indirect costs funding for fiscal year 1989." *Id.*

statutes involving Native Americans is to be interpreted to the benefit of the tribes.[124] The majority further reasoned that, in light of the ISDA's purpose of encouraging self-determination, Congress could not have intended the 1988 Amendment to maintain the status quo of underfunding tribal contract support costs.[125]

However, in addition to requiring government payment of tribal contract support costs, the 1988 amendment also contained language limiting the reimbursement funds available to the amount appropriated by Congress.[126] This provision gave rise to the litigation in *Babbit v. Oglala Sioux Tribal Public Safety Department.*[127] For fiscal year 1995, the congressional appropriation for ISDA contracts included a provision expressly limiting the amount allotted for contract support costs to $95,823,000, which only allowed the government to reimburse 91.74% of the tribe's support costs.[128] The Oglala Sioux Tribal Public Safety Department sued the Department of the Interior for their remaining $108,506 in negotiated contract support costs.[129] The Oglala Sioux argued that the overarching purpose of the ISDA trumped the limiting provision of the statute.[130] The Court of Appeals for the Federal Circuit disagreed, stating that the express language of the statute was unambiguous and thus could not be interpreted in favor of the Sioux.[131] The majority in *Oglala Sioux* distinguished the case from *New York Airways* on the grounds that the appropriation statute in *Oglala Sioux* contained language expressly limiting the amount

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124. *Id.* at 1461. The *Ramah* court explained:

> [While] we typically defer to the administering agencies interpretation [of an ambiguous statute] as long as it is based on a permissible construction of the statute at issue . . . [We] have held that federal statutes are to be construed liberally in favor of Native Americans, with ambiguous provisions interpreted to their benefit.

Id. See also Muscogee (Creek) Nation v. Hodel, 851 F.2d 1439, 1445 (D.C. Cir. 1988) (holding that "if the [Act] can reasonably be construed as the Tribe would have it construed it must be construed that way.").

125. *Ramah*, 112 F.3d at 1462.

126. 25 U.S.C. § 450j-1 (2005). "Notwithstanding any other provision in this Act, the provision of funds under this Act is subject to the availability of appropriations and the Secretary is not required to reduce funding for programs, projects, or activities serving a tribe to make funds available to another tribe or tribal organization under this Act." *Id.*

127. 194 F.3d 1374, 1376 (Fed. Cir. 1999).

128. *Oglala Sioux*, 194 F.3d at 1376.

129. *Id.* at 1377.

130. *Id.* at 1378.

131. *Id.* at 1378-79. *See also* South Carolina v. Catawba Indian Tribe, Inc., 476 U.S. 498, 505-06 (1986) (stating, "The canon of construction regarding the resolution of ambiguities in favor of Indians, however, does not permit reliance on ambiguities that do not exist; nor does it permit disregard of the clearly expressed intent of Congress.").

available for support costs, while *New York Airways* appropriation was simply insufficient to pay the government's previously contracted unqualified obligation.[132]

In his concurring argument, Judge Gajarsa sharply criticized Congress for including the limitation provisions in both the ISDA and in the 1994 appropriation.[133] Judge Gajarsa agreed with the Oglala Sioux that the support cost "cap" in the 1994 Appropriations Act contradicted the express purpose of the ISDA, thus diminishing the effectiveness of tribal self-determination contracts.[134] Finally, Judge Gajarsa suggested other Indian tribes, seeking full payment of their promised contract support costs, might consider the breach of contract theory which had proved successful for the thrift-plaintiffs in *Winstar*.[135]

The Government's argument in *Cherokee Nation* that tribal contractors were not protected by the Contracts Dispute Act because of their "special" status is unfortunately reminiscent of many previous legal decisions predicated on the assumption that Native Americans lacked the same rights as the non-Indian majority. Law, more than any other social tool, has contributed to the subordination of Native Americans.[136] From the Marshall Court's application of the Discovery Doctrine to Indian land[137] to Congress' stripping away of any remaining Indian sovereignty in 1871[138] to

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132. *Oglala Sioux*, 194 F.3d at 1379.

133. *Id.* at 1382-83 (Gajarsa, J., concurring). Judge Gajarsa stated:

> Although we as a court do not legislate but only interpret the laws that are enacted by the legislature, we cannot, and should not, stand idle without calling attention to the travesty that has been perpetrated in these cases. . . . The effect [of the legislation] is to leave the Native American tribes without recourse to recover the expenses that they had already incurred by performing BIA functions in reliance on the OIG negotiations.

Id.

134. *Id.* at 1382.

135. *Id.* at 1384. This theory was indeed successful in *Cherokee Nation*, 543 U.S. 631 (2005).

136. William Bradford, *With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1, 3 (2002/2003) (citing Robert A. Williams, Jr., *Columbus's Legacy: Law as an Instrument of Racial Discrimination Against Indigenous People's Rights of Self-Determination*, 8 ARIZ. J. INT'L & COMP. L. 51 (1991)).

137. Johnson v. M'Intosh, 21 U.S. 543, 584 (1823) (applying the rule of discovery to the lands of North America and holding that "[t]he United States, or the several States, had clear title to all the lands [in North American previously claimed by Great Britain], subject only to the Indian right of occupancy, and the exclusive power to extinguish that right was vested in [the] government.").

138. 25 U.S.C. § 71 (2005). "No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty." *Id.*

the imposition of non-Indian constitutional templates with the passage of the Indian Reorganization Act of 1934,[139] the history of United States-Tribal relations is replete with examples of legal harm to Native Americans.

While a detailed review of Native American jurisprudential history is clearly beyond the scope of this note, this history forms the context for *Cherokee Nation*. In recent decades, the federal government has begun some attempts at repairing the damage to tribal sovereignty.[140] In 1942, in *Seminole Nation v. United States*,[141] the United States Supreme Court noted that the federal government had a responsibility of special trust in relation to Native Americans.[142] In passing the ISDA, Congress prefaced the Act by a recognition of the federal government's responsibility to individual Indian tribes and of the importance of allowing those tribes to determine and provide their own services.[143] When Congress realized that providing those services was more expensive for the tribes than the government, Congress amended the ISDA to expressly provide for reimbursement of those additional costs.[144]

Unfortunately, as more tribes opted to provide their own services under the terms of the ISDA, Congress' regular increases to the annual appropriation were not sufficient to keep pace with the increase in allowable contract support costs, which tripled from

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139. Bradford, *supra* note 136, at 50. *See also* JUSTIN B. RICHLAND & SARAH DEER, INTRODUCTION TO TRIBAL LEGAL STUDIES 66 (2004) (quoting VINE DELORIA, JR. & CLIFFORD M. LYTLE, AMERICAN INDIANS, AMERICAN JUSTICE 99-103 (1983)). Deloria and Lytle suggest that the 1934 Indian Reorganization Acts severely damaged the traditional structures of tribal government.

> The political damage that had been inflicted upon tribal governments for so many decades in the past could not be undone overnight. . . . The format that emerged under the 1934 Act was almost a carbon copy of the structured, legalistic European form of government. . . . [The] Bureau of Indian Affairs . . . drafted a model constitution that could be used by the tribes [which] in most cases became the final product.

RICHLAND AND DEER, *supra*, at 66.

140. Whether the Government has succeeded or not is another issue beyond the scope of this note.

141. 316 U.S. 286, (1942).

142. *Seminole Nation*, 316 U.S. at 296-97. The United States Supreme Court recognized that

> [i]n carrying out its treaty obligations with Indian Tribes, the Government is something more than a mere contracting party . . . it has charged itself with moral obligations of the highest responsibility and trust. Its conduct as disclosed in the acts of those who represent it in dealings with the Indians, should therefore be judged by the most exacting fiduciary standards.

Id.

143. 25 U.S.C. § 450a(b) (2005).

144. 25 U.S.C. § 450j-1(a)(2) (2005).

1989 through 1998.[145] The Government, however, continued to form ISDA contracts with Indian Tribes, who reasonably expected the Government to fulfill its promised obligations.

In light of the painful history of United States-Indian relations, it was reprehensible of the Government to try to shift the risk of a funding shortfall onto tribes providing basic and necessary medical services to their people.[146] And in light of ISDA's stated purpose, it was somewhat astonishing that the Government would argue it had the right to withhold a unilaterally determined percentage of the lump-sum allotment to support the federal bureaucracy.[147] If the United States Supreme Court had supported this position, the decision would have penalized the tribes who elected for greater self-determination, thus undermining the entire purpose of the ISDA.[148]

Instead, the Supreme Court rightly went straight to the heart of the matter in *Cherokee Nation* by focusing on whether the self-determination contracts were "contracts" in the traditional meaning. The Court refused to allow the Government to yet again place Native Americans in a "special" category where they had fewer rights than others, in this case other contractors. By analyzing the case simply as a breach of contract action, the majority placed *Cherokee Nation* squarely in the line of cases stating that even the federal government must keep its promises or face the legal consequences.

Mary Jensen

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145. U.S. GEN. ACCOUNTING OFFICE, INDIAN SELF-DETERMINATION ACT: SHORTFALLS IN INDIAN CONTRACT SUPPORT COSTS NEED TO BE ADDRESSED, 3 (1999). The costs increased from about $125 million to about $375 million, resulting in a shortfall of about $95 million for 1998, the year following those at issue in *Cherokee Nation*. *Id.*

146. The Tribes argued that the Government's refusal to fully reimburse them had serious repercussions in the level of medical care the Tribes were able to provide. "The Secretary's failure to fund the Shoshone-Paiute's Owyhee Hospital contract led to such severe cutbacks that the Hospital nearly lost its accreditation." Reply Br. for Cherokee Nation and Shoshone-Paiute Tribes at 5, *Cherokee Nation*, 543 U.S. 631 (Nos. 02-1472, 03-853).

147. During oral arguments, Justice Souter noted that the Government's argument allowed the Indian Health Services bureaucracy to "swallow[] the entire budget" by allotting the apportion to either "inherent federal functions" or to agency services to non-contracting tribes. Tr. of Oral Argument at 49-50, *Cherokee Nation*, 543 U.S. 631 (2004) (Nos. 02-1472, 03-853).

148. Those tribes would have to pay their own contract support costs, which would almost certainly require a reduction in services. Tribes would be forced to choose either (a) reduced health care services under a self-determination contract or (b) reduced autonomy under directly provided services agreement.